In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1141

ALBERT DE POMPEIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner raises two issues—the propriety of limiting enquiry into the facts behind a government witness's prior misdemeanor conviction and the significance of an alleged conflict of interests of a co-defendant's counsel.

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted on four counts of having sold counterfeit Federal Reserve notes and having conspired to do so in violation of 18 U.S.C. 2, 371, and 473. He was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed (Pet. App. A).

1. Evidence at trial revealed that co-defendant Mary Alberti persuaded one Paul Hayman, a commercial printer, to print $200,000 in counterfeit bills (Tr. 30-33, 130-137). After Alberti and co-conspirator Edward Korjus sold many of the bills, Miss Alberti "sensed that the

Secret Service was on [them]" (Tr. 139-148, 151, 155). Thereupon, she took $24,000, the remaining counterfeit money, to the apartment of her friend Terry Rogers, for safekeeping (Tr. 157-158). When Miss Rogers refused to keep the counterfeit bills, Alberti phoned her "boyfriend Al" and, after phoning, told Miss Rogers that Al would be coming there. An hour later petitioner, Albert De Pompeis, arrived (Tr. 217-219).

Mary Alberti told petitioner that Miss Rogers did not want to keep the money (Tr. 223). Petitioner, who knew the money was counterfeit, replied that Miss Rogers "had better keep it until he could make some other arrangements" (Tr. 225, 227). Two nights later petitioner informed Miss Rogers that Alberti and Edward Korjus had been arrested for counterfeiting and that she should be careful because Korjus probably would not "hold up under questioning" (Tr. 228). Petitioner requested that Miss Rogers bring the money to him and, when she failed to keep the scheduled appointment, petitioner phoned her to ask why she had not met him (Tr. 229). She told petitioner that she would not bring the money to him and that, if he wanted the money, he should come and get it before she burned it, flushed it down the toilet or turned it over to the police. Petitioner told Miss Rogers that she "had better not do any of those things" and that he would send someone under the name of "Uncle Herman" to pick up the remaining money (Tr. 229-231). The next day, September 15 or 16, 1970, a man calling himself "Uncle Herman" came to Miss Rogers' apartment and picked up the counterfeit money (Tr. 231-232).

On approximately September 15, 1970, petitioner approached a friend, one Larry Silverman, and offered to sell him counterfeit money (Tr. 421-422). Subsequently, on three occasions, petitioner sold Silverman counter-

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feit currency in the amounts of $2,000, $10,000 and $5,000 (Tr. 423-427, 429-440).

2. On direct examination Mr Silverman, a government witness, testified that he had been convicted in 1968 of third degree assault, for which he received a suspended sentence (Tr. 449). On cross-examination the court sustained an objection to petitioner's attempt to elicit from Silverman that his conviction for third degree assault resulted from an original charge of forcible sodomy (Tr. 500, 503-504).

Petitioner contends that the court abused its discretion in refusing to permit his counsel to cross-examine Silverman about the factual background of Silverman's conviction for third degree assault. However, as noted by the court below (Pet. App. A 11a), "inasmuch as the conduct involved does not relate to truthfulness or untruthfulness, * * * the district court properly limited the cross-examination. See 3 Wigmore §982 at p. 840; and Rule 608(b) of Proposed Federal Rules of Evidence for the United States Courts and Magistrates." This is the general rule regarding impeachment by the use of prior misdemeanor convictions. Moreover, petitioner, whose participation in the counterfeiting conspiracy had already been established by the testimony of Miss Rogers, was in no way prejudiced by the court's ruling, particularly since Silverman's credibility was challenged in other ways by petitioner's counsel.[1]

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[1]Counsel brought out on cross-examination that Silverman passed counterfeit bills to hundreds of people, that Silverman's partner in distributing the bills was a burglar, and that Silverman hoped to receive favorable consideration from the sentencing judge by testifying at the instant trial (Tr. 465, 475-476, 478, 484). Additionally, one Sue Levine, called as a character witness to challenge Silverman's credibility, testified that Silverman was a "liar" and gratuitously stated, in the presence of the jury, that Silverman "raped my mother" (Tr. 626-627).

3. Petitioner's contention that Mary Alberti's lawyer had a potential conflict of interests in representing Korjus, a government witness, as well as Alberti was raised in the petition for a writ of certiorari filed in the companion case of *Alberti* v. *United States,* No. 72-6077. On April 2, 1973, certiorari was denied in that case. The circumstances surrounding this contention have been dealt with in our brief in opposition to Alberti's petition.[2] Essentially, since Korjus had pleaded guilty prior to the trial of Alberti, her attorney was free to represent her fully and did so (Tr. 191-192). Moreover, petitioner's lawyer, Mr. Lyon, had no conflict of interests and specifically approved the conduct of the trial judge concerning the alleged conflict, *i.e.,* his decision to allow the trial to proceed after the question had been raised (Tr. 192). Moreover, petitioner's standing to raise this issue seems doubtful. And since the Court has denied review of the conviction of the defendant whose lawyer was allegedly involved in the conflict, there is no reason to consider the issue in this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1973.

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[2]We are furnishing a copy of this brief to counsel for petitioner.